SUPREME COURT, U.S.
FILED
FEB 13 2004
OFFICE OF THE CLERK

No. 02-1624

IN THE SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT,
PETITIONERS

v.

MICHAEL A. NEWDOW, *ET AL.*,
RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Brief *Amicus Curiae* of American Atheists In Support of Respondents

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QUESTION PRESENTED

Whether a public school policy that requires teachers to lead willing students in reciting the pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

American Atheists is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair, for over thirty years American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause. American Atheists' perspective is rooted in the philosophy of materialism, "which holds that nothing exists but natural phenomenon."[2] No gods, spirits, fairies, or other imagined entities pull at the strings of humanity. The materialist philosophy of Atheism promotes a positive viewpoint and provides the impetus to effect change. In the words of Ms. O'Hair,

> Materialism compels faith in the human intellect, in the power of knowledge of man's ability to fathom all the secrets of nature and to create a social system based upon reason and justice. Materialism's faith is in man and his ability to transform the world by his own efforts. It is a philosophy in every essence optimistic, life-asserting, and radiant. It considers the struggle for progress as a moral obligation, and impossible without noble ideals that inspire men to struggle, to perform bold, creative work.[3]

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Madalyn Murray O'Hair, *Atheism,* American Athetists, *at* http://www.atheists.org/Atheism/atheism.html (last visited February 3, 2004).

[3] *Id.*

Given American Atheists' unswerving dedication to the Atheist cause for over three decades, and the undisguised attack on Atheism and its materialist philosophy launched by the engrafting of the words "under God" into the Pledge of Allegiance in 1954, American Atheists submits this brief in support of Respondent and urges the Court to affirm the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

> Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation.[4]

Though these words were penned by James Madison over two hundred years ago, they resonate with equal clarity today. The locations may have changed, but the religious

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[4] Memorial and Remonstrance against Religious Assessments (June 20, 1785) *in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973) (citations omitted).

bloodshed continues. Madison's cure for this disease was simple: the greatest protection against religious strife and bloodshed is to guarantee equal and complete liberty for all with regard to religious opinions. It is this guiding principle that serves as the foundation of the Religion Clauses of the First Amendment. The insertion of the words "under God" by the "Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America" (the "1954 Act"),[5] and the continued governmental "suggestion"[6] that these words be repeated daily in our children's classrooms, is an unconstitutional infringement upon the rights of conscience of every Atheist.

ARGUMENT

I. THE PROTECTIONS GUARANTEED UNDER THE RELIGION CLAUSES OF THE FIRST AMENDMENT

A. The Drafters of the Bill of Rights Intended to Separate Government from Religion by Broadly Protecting the "Rights of Conscience" from Government Intrusion

As this Court has consistently stated over the past 50 years, the First Amendment was intended to erect "a wall of separation between church and State."[7] Admittedly the record is spotty with regard to the precise meaning each and every representative attributed to the phrase that ultimately became the Religion Clauses of the First Amendment.

[5] H.J. Res. 243, 83rd Congress, 68 Stat. 249 (1954).
[6] As James Madison noted in his Detached Memoranda, "An advisory Govt is a contradiction in terms." Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM & MARY Q. 534, 560 (3rd Series, 1946).
[7] Everson v. Board of Education, 330 U.S. 1, 16 (1947)).

However, it is beyond doubt that the broad edict that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" was intended to keep the meddling hands of government out of the inherently personal realm of religion.[8]

James Madison, Jefferson's ally in advancing Virginia's Statute of Religious Liberty,[9] played "as large a part as anyone in the drafting of the Bill of Rights."[10] "The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this: 'The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.'"[11] Though this precise wording was not ultimately adopted, it is illustrative of the scope of freedom this key actor sought to guarantee, and is in complete harmony with his efforts in securing and promoting religious freedom in Virginia prior to the first Congress. Notably, Madison's *Memorial and Remonstrance against Religious Assessment* to the General Assembly of the Commonwealth of Virginia gives a fair assessment of his views on where the line of demarcation between church and state should lie. In a part representative of the whole, Madison said:

> If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all they are to be considered as

[8] U.S. CONST. amend. I.
[9] Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J. dissenting).
[10] *Id.*
[11] *Id.* at 94 (citing 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

> retaining an "equal title to the free exercise of Religion according to the dictates of conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.[12]

This unabashed statement of broad and unequivocal religious freedom, embracing all forms of belief or disbelief, made in the context of opposition to a proposed governmental religious enactment, suggests that Madison would agree with Jefferson's "wall of separation" précis. Though Madison may have subscribed to the contemporary school of thought that federal governmental powers were so limited as to render the Bill of Rights unnecessary, it is unlikely that Madison would have voted for a Bill of Rights that would allow civil authority to trample the very rights he found so precious. Regardless, there is no need to speculate as to whether Madison believed that there should be a "wall of separation" between church and state. In a letter to Edward Livingston dated July 10, 1822, written some thirty-three years *after* he participated in the drafting of the Religion clauses, Madison wrote:

> Notwithstanding the general progress made within the two last centuries in favour of this branch of liberty, & the full establishment of it, in some parts of our Country, there remains

[12] Memorial and Remonstrance against Religious Assessments (June 20, 1785) *in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973) (citations omitted).

> in others a strong bias towards the old error, that without some sort of aHiance or coalition between Govt. & Religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such its corrupting influence on both the parties, that the danger *cannot be too carefully guarded agst.* And in a Govt. of opinion, like ours, the only effectual guard must be found in the soundness and stability of the general opinion on the subject. Every new & successful example therefore of a *perfect separation between ecclesiastical and civil matters, is of importance.* And I have no doubt that every new example, will succeed, as every past one has done, in shewing that *religion & Govt. will both exist in greater purity, the less they are mixed together.*[13]

Further, in a letter to the Rev. Jasper Adams written in 1832, Madison provided some guidance to be used in tracing the appropriate line of demarcation between church and state. Here Madison unequivocally stated:

> [I]t may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collision and doubts on unessential points. The tendency to unsurpastion on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinence of the Gov't from interference in

[13] Letter from John Madison to Edward Livingston (July 10, 1822*), in* 9 THE WRITINGS OF JAMES MADISON 98, 101–102 (Gaillard Hunt ed., 1910) (emphasis added).

> any way whatsoever, beyond the necessity of preserving public order, and protecting each sect agst. trespasses on its legal rights by others.[14]

From these writings, it is clear that Madison viewed "perfect separation" between god and government as an appropriate goal, and that any doubts as to where the line should be drawn are best resolved by pursuing a policy of complete government abstinence from religious debate. This view is no different from Jefferson's "wall of separation."

It is obvious that Madison viewed the complete separation of church and state as a necessity, both in his work in Virginia prior to the drafting of the Bill of Rights, and in his writings thereafter. Some of Madison's other writings also make it clear that he believed that this type of strong separation was guaranteed by the Constitution. For example, Madison declared in his Detached Memoranda, written in 1817, that "[s]trongly guarded is the separation between Religion & Govt *in the Constitution of the United States* . . . ."[15] Further, in a letter explaining his objection to a bill containing a grant of public land to the Baptist Church, Madison told the church in 1811 "[h]aving always regarded the practical distinction between Religious and Civil Govt as essential to the purity of both, and *as guaranteed by the Const: of the U. S.* I could not have otherwise discharged my duty on the occasion which presented itself."[16] Any argument that Madison, "undoubtedly the most important

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[14] Letter from James Madison to Rev. Jasper Adams (1832) *in* 9 THE WRITINGS OF JAMES MADISON 484, 487 (Gaillard Hunt ed., 1910).
[15] Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM & MARY Q. 534, 555 (3rd Series, 1946).
[16] Letter from James Madison to Jesse Jones and Others (June 3, 1811) *in* 3 THE PAPERS OF JAMES MADISON, PRESIDENTIAL SERIES 323, 323 (J.C.A. Stagg, Jeanne Kerr Cross, & Susan Holbrook Perdue eds., 1996).

architect . . ."[17] of the Bill of Rights, did not buy into Jefferson's "wall of separation" doctrine would ignore Madison's own words and pervert his clearly expressed view of the rights guaranteed under the Constitution.

Though Madison was arguably the single most important participant in the drafting of the Bill of Rights, and his intent with regard to religious freedom is clear, he did not act alone. The words of others that helped shape the Religion Clauses of the First Amendment also shed light on this discussion. In discussing the proposed amendment, Senators Sylvester and Huntington indicated that they feared that the proposed form "no religion shall be established by law, nor shall equal rights of conscience be infringed" could have a tendency to abolish or do violence to religion.[18] Others quibbled with the verbiage or thought the provision unnecessary.[19] However, the *only* view stated with regard to the *intent* of the amendment was that it was to protect the rights of conscience as pertaining to the inherently personal subject of religion.[20]

Senator Carroll noted that "As the *rights of conscience* are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hands; and as many sects have concurred in opinion that they are not well

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[17] Wallace v. Jaffree, 472 U.S. 38, 97 (1985) (Rehnquist, J., dissenting).
[18] *See* 1 ANNALS OF CONG. 729–30 (Joseph Gales ed., 1789). Senator Sylvester stated that he feared this clause would have "a tendency to abolish to abolish religion altogether." *Id.* at 729. Senator Huntington feared that this language "might be taken in such latitude as to be extremely hurtful to the cause of religion." *Id.* at 730.
[19] *Id.* at 730. Senator Gerry felt the clause should be changed to say "that no religious doctrine shall be established by law." *Id.* Senator Sherman believed that "Congress had no authority whatever delegated to them by the Constitution to make religious establishments" and therefore would have the Amendment "struck out." *Id.*
[20] *See id.* at 729-31.

secured under the present Constitution, he said he was much in favor of adopting the words."[21] Senator Madison stated that he believed that the words suggested were intended to protect the "rights of conscience," and that the intent was "as well expressed as the nature of the language would admit."[22] Senators Huntington and Livermore also stated their understanding that the amendment was to broadly protect the "rights of conscience."[23] No senator expressed a different understanding of the intent of the amendment.[24]

Though there were no long-winded debates recorded in this scant record, it seems fair to state that "the most important architect"[25] of the Bill of Rights and the others that chose to speak on the intended meaning of the proposed amendment believed that they were broadly securing protection for "rights of conscience" as pertaining to religion. Given that *no* senator stated a contrary understanding of the meaning of the proposed amendment, it seems reasonable to say that the general consensus was that the intent was to broadly protect the "rights of conscience" from government intrusion.

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[21] *Id.* (emphasis added).
[22] *Id.*
[23] Senator Huntington stated that "[h]e understood the amendment to mean what had been expressed by the gentleman from Virginia; but that others might find it convenient to put a different construction upon it." He also said "He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience . . . ." *Id.* at 730. Senator Livermore stated that he "was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it were altered, and made it to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience." *Id.* at 731.
[24] *See id.* at 729–31.
[25] Wallace v. Jaffree, 472 U.S. 38, 97 (1985) (Rehnquist, J., dissenting).

In addition to showing a consensus understanding of the intent of the amendment, the record also shows that many were loathe to quibble with the exact wording of the provision, so long as it secured protection for the "rights of conscience." Senator Carroll indicated that "[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance [of protection for the rights of conscience]. . . ."[26] Senator Livermore was not satisfied by the chosen wording, preferring the form "Congress shall make no laws touching religion, or infringing the rights of conscience," but did not wish to dwell on the matter.[27] Senator Madison, though satisfied with the wording, offered a minor revision to satisfy the minds of others.[28] The early version of the First Amendment discussed in the congressional record, commanding that "no religion shall be established by law, nor shall equal rights of conscience be infringed," passed the Senate by a vote of thirty one for, twenty against.[29] Subsequent revision of the precise wording was done with little fanfare.[30] Ultimately, both the House and Senate settled on "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[31] Adoption of this broadly phrased amendment in the Senate sparked no outcry from those believing that the intent was to protect the "rights of conscience." The lack of objection to the broadly worded phrase ultimately adopted, and Madison's own words later describing the Constitutional protection from government intervention into religion, leads to the reasonable conclusion that the people responsible for the Religion Clauses of the First Amendment believed that they had been successful in

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[26] 1 ANNALS OF CONG. at 730.
[27] *Id.* at 731.
[28] *Id.*
[29] *Id.*
[30] *See Wallace*, 472 U.S. at 91–114 (Rehnquist, J., dissenting).
[31] U.S. CONST. amend. I.

securing strong protection for the "rights of conscience" from the meddling hand of government.

B. Atheists are Protected by the First Amendment

This section, though it should seem unnecessary, is directed to the erroneous belief that the drafters of the Religion Clauses, with their inherent biases rooted in their personal religious beliefs, never intended to include "irreligion" among the "sects" protected from discrimination. This is pure nonsense. The drafters of the Religion Clauses could have chosen, but did not, to adopt phrasing narrowly protecting the rights of all to worship their respective god, while excluding protection for those professing no such belief. Instead, they chose to offer broad protection for the "rights of conscience" of all.

The term "conscience" referred to the same concept then as it does now, the internal moral compass that guides human beings in their choices between right and wrong.[32] The concept of "freedom of conscience" as pertaining to religion simply meant that given the inherently personal nature of religion, citizens should be free to look to their own conscience in making these deeply personal choices.[33] What

[32] Merriam-Webster's Collegiate Dictionary defines "conscience" as "the sense or consciousness of the moral goodness or blameworthiness of one's own conduct, intentions, or character . . . ." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 245 (10th ed. 1997). Jefferson described "conscience" as "a sense of right and wrong . . . ." Letter from Thomas Jefferson to Peter Carr (August 10, 1787), *in* 6 THE WRITINGS OF THOMAS JEFFERSON 256, 257 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

[33] In the words of Madison: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men,

a strange world it would be if the freedom to follow your conscience in religious matters were suddenly cut off if your conscience directed you to step beyond the palate of offerings of recognized theology. Fortunately the drafters imposed no such limitation. Madison's view, as expressed in Virginia, was that in matters of religion, freedom of conscience had no bounds. If one chose to "abuse" that freedom, it was between them and god, not man.[34] Jefferson put it this way:

> The error seems not sufficiently eradicated that the operations of the mind as well as the acts of the body are subject to the coercion of the laws. But our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. *But it does me no injury for my neighbor to say*

depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men . . . ." Memorial and Remonstrance against Religious Assessments (June 20, 1785) *in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973) (citations omitted).

[34] "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered." Memorial and Remonstrance against Religious Assessments (June 20, 1785) *in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973).

there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.[35]

Regardless of the slant contemporaries may choose to put on the enactments of people operating during a deeply religious period, when belief in god was an assumed norm, it is indisputable that the drafters of the Bill of Rights intended that all should have the equal right to follow their conscience, wherever it leads them, with regard to the intensely personal matter of religion. The oft-repeated mantra that "our Nation was founded on a fundamental belief in god,"[36] is as misleading today as it was the first time it was uttered. A far more accurate statement is that our Nation was founded by people who generally believed in god, but who also had the wisdom to recognize the potential for mischief in mixing religion and government. In the words of Madison:

> What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government, instituted to secure & perpetuate it needs them not. Such a Government will be best

[35] Jefferson's Works: Notes on Virginia, Query XVII (1782) *in* 2 THE WRITINGS OF THOMAS JEFFERSON 217, 221 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (emphasis added).
[36] Act of May 28, 1954, Pub. L. No. 83–1683, 1954 U.S.C.C.A.N. 2339, 2340.

> supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.[37]

The drafters of the Bill of Rights saw fit to draw a practical distinction between holding a belief in god, and directing others to believe in god. The former was the lens through which they saw the world; the latter was the mischief they sought to prevent. They recognized that people's minds "can be directed only by reason and conviction, not by force or violence,"[38] and that a just government has no need to try. Accordingly, they limited the legitimate domain of government with respect to religion to "the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others."[39]

The plain language of the Establishment Clause unequivocally secures the right of *all* to follow their conscience with regard to the personal matters of religion. Though some may weakly argue that it did not include Atheists under its umbrella at the time the Bill of Rights was drafted, there can be no doubt that it certainly does today. This court has repeatedly acknowledged as much. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the majority unequivocally stated:

[37] Memorial and Remonstrance against Religious Assessments (June 20, 1785) *in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973).
[38] *Id.* at 302.
[39] Letter from James Madison to Rev. Jasper Adams (1832) *in* 9 THE WRITINGS OF JAMES MADISON 484, 487 (Gaillard Hunt ed., 1910) (emphasis added).

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[40]

Far from an isolated minority view, this statement finds broad support in the words and actions of this Court and its various members through the decades, and has been reiterated in more recent decisions of this Court.[41] To paraphrase Jefferson, the Constitution of the United States includes within the mantle of its protection the Jew and the Gentile, the Muslim and the Hindu, and the infidel of every denomination.[42]

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[40] Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (citations omitted).

[41] For example: "At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the Atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (footnotes omitted).

[42] Jefferson made essentially the same statement referring to the Virginia Statute for Religious Libery. *See* Jefferson's Works: Autobiography (January 6, 1821), *in* 1 THE WRITINGS OF THOMAS JEFFERSON 1, 67 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

II
THE ADDITION OF THE WORDS "UNDER GOD" TO THE PLEDGE OF ALLEGIANCE VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. The Ninth Circuit Properly Applied Existing Establishment Clause Doctrine

This brief does not review the Ninth Circuit's analysis of the 1954 Act in the context of this Court's previous guidance because it is part of the record, and "[u]nder any fair reading of the relevant precedents, the Ninth Circuit . . . correctly applied [the authoritative] Establishment Clause doctrine."[43] Rather, the focus of this section will be on the facts surrounding the 1954 Act and the gross infringement of the sectarian Pledge on the Atheist's freedom of conscience.

B. The Intent and Effect of the 1954 Act was to Denigrate and Disparage those with Atheistic Views as Part of a Political Strategy to Distinguish "Us" from the "Godless Communists"

To understand the magnitude of affront the sectarian Pledge imposes on this Nation's Atheist community, one only needs to look to the record documenting the 1954 insertion of the words "under God" into the previously secular Pledge of Allegiance. The record unabashedly paints the picture of a government taking a stand on an inherently personal religious matter: the belief or disbelief in god. Further, the government purposefully takes this stand at the express expense of the Atheist.

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[43] Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia,* 81 N.C. L. REV. 1865, 1870 (2003).

The affront begins with the words Senator Ferguson suggested to be added to the Pledge, "under God." The plainly read meaning and intended import of the Pledge after revision is that our Nation is subservient to and draws its power from a deity. The Committee on the Judiciary, to which the resolution to add the offending words was referred, acknowledged (or perhaps more accurately, declared) as much. In pertinent part, Senator Ferguson's letter to the Chairman asserted that "a government deriving its powers from the consent of the governed must look to God for divine leadership," that "[n]o nation can be strong except in the strength of God or safe except in His defense," that "one of the greatest differences between the free world and the Communists [is] a belief in God," and that Communists suffer from "spiritual bankruptcy" because they lack such a belief in god, and that "[t]he phrase 'under God' recognizes . . . the guidance of God in our national affairs . . . ."[44] Suffice it to say that these statements trample the beliefs of those who view "god" as an imagined creation of man.

The statement issued by the House of Representatives was no less offensive.

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral

[44] 100 CONG. REC. 6231 (1954).

> directions of the Creator. *At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.*[45]

In addition to this ignorant and intolerant attack on Atheism, the House went on to state that the intent of the revision was to ensure that schoolchildren were "daily impressed" with this "true understanding of our way of life."[46] As in the Senate, the House also disregarded the conscience of the Atheist in its stampede to use religion to distinguish "us" from the "godless communists."

The Congressional record documenting the celebration after the insertion of the words "under God" into the Pledge presents an even greater insult. Senator Ferguson, seemingly pleased that the Pledge of Allegiance now recognizes that "we are a people who do believe in and want our Government to operate under divine guidance," and that these "words which forever . . . will be on the lips of Americans," saw it fitting to include in the Congressional record two contemporary descriptions of the first Flag Day celebration utilizing the newly sectarian Pledge.[47] Of particular note is the bombastic account by Dr. Harris, the Senate's Chaplain. Apparently capturing the spirit of the newly sectarian Pledge, upon unanimous consent Dr. Harris' column documenting the ceremony was added to the record.[48] The religious message of the sectarian Pledge was not lost on Dr. Harris, nor likely missed by those watching the ceremony broadcast on the CBS Television Morning Show. In the words of Dr. Harris,

[45] Act of May 28, 1954, Pub. L. No. 83–1683, 1954 U.S.C.C.A.N. 2339, 2340 (emphasis added).
[46] *See id.* at 2341.
[47] 100 CONG. REC. 8617 (1954).
[48] *Id.*

> To put the words "under God" on million of lips is like *running up the believer's flag* as the witness of a great nation's faith. *It is also displayed to the gaze of those who deny the sacred sanctities which it symbolizes.*
>
> On that June day . . . as the radio carried their voices to listening thousands, together these lawmakers [Senator Ferguson and others] repeated the pledge which is now the Nation's. Then, appropriately, as the flag was raised a bugle rang out with the familiar strains of "Onward, Christian Soldiers!"[49]

Dr. Harris proceeded to quote in part "the magnificent words of President Eisenhower"[50] as expressed in his Flag Day speech. President Eisenhower's speech in pertinent part reads as follows:

> From this day forward, the millions of our schoolchildren will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to *the* Almighty. *To anyone who truly loves America, nothing could be more inspiring* than to contemplate this rededication of our youth, on each school morning, to *our country's true meaning.*
>
> Especially is this meaningful as we regard today's world. Over the globe, mankind has been cruelly torn by violence and brutality and, by the millions, *deadened*

[49] *Id.* (emphasis added.)
[50] *Id.*

> *in mind and soul by a materialistic philosophy of life.*
>
> * * *
>
> In this way we are *reaffirming the transcendence of religious faith* in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource, in peace or war.[51]

After quoting from President Eisenhower's speech, Dr. Harris launched into a tirade that *at best* would be described an indictment of every Atheist's personal choice of conscience. Dr. Harris preached, *inter alia*, that "[t]he results of blasphemous denials of God on a tremendous scale already are being shudderingly shown by the *baneful social pattern of Atheistic materialism*," that those who do not believe in god should be "called before the bar of reason . . ," that Atheism is "absurd," that "[m]an will either choose to be governed by God or condemn himself to be ruled by tyrants," and that "[a]ny so-called freedom, if it is not under God, is under the sentence of death."[52]

In incorporating, as Senator Ferguson described, the "eloquent"[53] words of Dr. Harris into the Congressional record by *unanimous consent*, the 100th Senate adopted these words as their own, to forever reflect the ignorance and intolerance of those subverting a fundamental constitutional right. Speaking with one voice, the 100th Senate denigrated and disparaged the personal choice of conscience of Atheists everywhere, including those peacefully residing within America's borders and faithfully serving her ideals of freedom.

[51] *Id.* at 8618 (emphasis added).
[52] *Id.* (emphasis added).
[53] *Id.* at 8617.

C. "Under God" is an Unnecessary Part of an Otherwise Patriotic Exercise

There is a view that the words "under God" could "serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'"[54] However, the unspoken assumption underpinning this view is that there was at least *some* need for solemnity that went unserved prior to the 1954 Act. Given the serious implications of mixing religion and government, and the repeated warnings against such an alliance by Jefferson and Madison,[55] there should at least be some cognizable need for solemnity served by such a religious enactment.

Francis Bellamy put pen to paper in 1892 and crafted a simple, honest expression of patriotism that substantially endures to this day. He wrote "I pledge allegiance to my flag and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."[56] These brief words were intended to capture the essence of America, and to serve as an appropriate means to commemorate the raising of the flag over our Nation's schools on Columbus Day, 1892.[57] The words "one Nation indivisible" referenced the continued vitality of the United States following the Civil War, and "liberty and justice for all" sought to sum up the American dream.[58] Though various revisions were made to

[54] Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurrence) (citing Lynch v. Donnelly, 465 U.S. 668, 693 (1984)).
[55] *See, e.g.,* Memorial and Remonstrance against Religious Assessments (June 20, 1785) *in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973).
[56] 100 CONG. REC. 8618 (1954).
[57] *Id.*
[58] *Id.*

the Pledge over the years to clarify it's meaning, it survived until 1954 without asserting this Nation's subservience to a god.

In drafting the Pledge, it is significant that Mr. Bellamy chose to allude to the Civil War, the bloodiest conflict in our Nation's history. Such a reference could not be taken lightly, and in fact it was received as a positive message of national unity to a country still healing.[59] Given that the Civil War was still fresh in the memories of Americans at the time Francis Bellamy's secular Pledge was introduced, it is unlikely that this earliest version was recited with anything but solemn reverence and hope for the future.

Secular versions of the Pledge served this Nation through both World Wars. The formal codification of the Pledge in 1942 brought with it official direction with regard to the appropriate decorum when reciting the Pledge. In pertinent part, H.J. Res. 303, 56 Stat. 377 directs that "the pledge of allegiance to the flag . . . be rendered by standing with the right hand over the heart . . . standing at attention, men removing the headdress. Persons in uniform shall render the military salute.[60] The intent of this official direction, consistent with history and practice, was to make uniform the already unmistakably solemn event of public recitation of the Pledge of Allegiance. This official direction, and the decades of solemn recitation of the Pledge prior to the addition of the words "under God" in 1954, cut against any argument that there was *any* need for solemnity to be served by the addition of the words "under God" in 1954.

[59] *Id.*
[60] H.J. Res. 303, 77th Congress, 56 Stat. 377 (1942).

The solemn nature of the secular Pledge was also acknowledged by Senator Homer Ferguson when he sought to introduce the words "under God" into the Pledge. In an attempt to show the need to introduce religion into our Pledge to distinguish "us" from the "godless communists," Senator Ferguson quoted a sermon by Reverend George M. Docherty, in which Rev. Docherty preached: "[i]ndeed, apart from the mention of the phrase, 'the United States of America,' it could be the pledge of any republic. In fact, I could hear little Moscovites repeat a similar pledge to their hammer-and-sickle flag in Moscow with equal *solemnity*."[61]

Are we to now believe that some important need for solemnity existed and was only adequately served by the addition of the purely religious words "under God" to the Pledge? Prior to the sectarian revision of the Pledge, was there a great outcry about the lack of solemnity of the secular Pledge? Of course not. The secular Pledge solemnly stood through two World Wars without the taint of religion. Reciting the Pledge of Allegiance, whether with hand on heart or while rendering a military salute, has *always* been a uniquely solemn event. It is an affirmation of commitment to America's promise of liberty and equality, and a recognition that these precious freedoms have been maintained only through the great sacrifice of those that have come before us. This is not a situation where civil authority was required to choose between alternative means to lend solemnity to an otherwise lighthearted occasion. This is a situation where the ecclesiastical establishment adds absolutely nothing to an already solemn event. No reasoned "solemnity" justification exists where, as here, wholly secular means fully achieve that goal.[62]

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[61] 100 CONG. REC. 6231 (1954) (emphasis added).

[62] As Justice Douglas aptly noted: "What the Framers meant to foreclose . . . are those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends, where secular means would suffice." Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 295 (1963) (Douglas, J., concurring). However, here it is not merely that secular means *suffice*, but rather a situation where the secular means *fully achieved the goal for over fifty years prior to the offending ecclesiastical establishment.*

D. The Sectarian Pledge Created by the 1954 Act Prevents Atheists From Pledging Allegiance to Their Country

There is a temptation among many to discount the indignation felt by members of this Nation's Atheist community when standing with silent respect while others pledge allegiance to their country. After all, since *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1943), they can no longer be commanded to verbally acknowledge that their Nation is subservient to a deity in which they do not believe. How much of an imposition can it be to simply *"sit down and shut up!"*[63] while people who believe in god pledge allegiance to their nation with favored reverence? The only proper answer to such a question is to put yourself in the shoes of the disfavored minority, whose views on religion are generally treated with utter disrespect by the theistic majority.

"Pledge" as relevant to this discussion means "a binding promise or agreement . . . ,"[64] whereas "allegiance" in this context refers to "the fidelity owed by a subject or citizen to a sovereign or government."[65] Like an oath, the Pledge of Allegiance is an affirmation of loyalty and fidelity to ones country while serving a tenured term as a citizen of

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[63] Petition Online, *The Warning: God and Prayer is the topic (read and sign or ignore) Petition, available at* http://www.petitiononline.com/KeepGod/petition.html (last visited January 25, 2004) (directing Atheists to "sit down and shut up" while the majority enjoys governmental support of their religious preference).

[64] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 893 (10th ed. 1997).

[65] *Id.* at 30.

this great Nation. This is the setting in which the Atheist is told to step off the bus. To any patriotic American, the Pledge of Allegiance should be a public affirmation of loyalty to the noble ideals of equality and freedom for which our country has struggled. Instead it is "an unavoidable slap in the face"[66] to the patriotic Atheist.

Engrafting the words "under God" into the Pledge of Allegiance has turned words that were meant to unite into words destined to divide. An Atheist cannot be expected to "seamlessly and without fanfare or even notice . . . omit the 'under God' from her own recital of the Pledge,"[67] as the continued inclusion of these words is a recurrent reminder of her Nation's disdain for her. These words call for recitation by the favored or silent protest by the disfavored. There is no middle ground. Why should an Atheist even bother to pledge allegiance to a nation that rejects him? This is not a minor trespass on an insignificant corner of the Atheist's ideological backyard; this is a daily message of disfavor.

The words "under God" have more than a "de minimus" tendency to promote religion,[68] and have not been sanitized of their religious meaning by the sands of time.[69] If the words "under God" no longer evoke a religious meaning, or their ability to promote religion is de minimus, then it would seem to be of little consequence to restore the Pledge to its previous secular state. Are we to believe that

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[66] Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1893 (2003).
[67] Michael J. Perry, *Freedom of Religion in the United States: Fin de Siecle Sketches*, 75 IND. L.J. 295, 316 n.71 (2000).
[68] Newdow v. U.S. Congress, 292 F.3d 598, 613–615 (9th Cir. 2002).
[69] "The insertion of God into the pledge may have been for religious reasons ... but five decades later, the phrase under God no longer evokes a religious experience." David Kravets, *Judge Says His Ruling on Pledge Had Supreme Court Precedents*, PHILADELPHIA INQUIRER, July 5, 2002, at A10.

those seeking to retain the words "under God" are merely devoted historians nostalgic for those good old Cold War days? Before dismissing as "de minimus" the religious message sent by the sectarian Pledge, I respectfully ask the Court to at least consider the perspective of those whose beliefs are trampled by this governmental endorsement. It is the Atheist's view that is most relevant to this analysis, and not the view of the favored class. The theist, who benefits daily and would never find such an endorsement offensive, may not even notice the words. It is the opinion of the Atheist that carries the most authority, because it is the Atheist that is singled out for the daily "slap in the face."

To truly understand the impact of the sectarian Pledge on the Atheist, the reasonable jurist must consider an edit of the sectarian Pledge to reflect the appropriate degree of favor to a religious concept opposed to his or her own. To the theoretical "nondenominational" Deist or to the Christian, I suggest considering a sectarian Pledge containing the words "one Nation, freed from the shackles of 'god'. . . ." To the Jew, I suggest "one Nation, under Jesus Christ our Savior. . . ." Only after seriously contemplating the daily message of disfavor can one begin to understand an Atheist's offense to words barely noticed by the believer.

E. Public Law 107-293 Does Not Rehabilitate the Unconstitutional Nature of the Sectarian Pledge

Immediately following the Ninth Circuit's decision in this case, Congress attempted to scrub the unconstitutional intent from the sectarian Pledge by codifying the Pledge anew.[70] Ironically, this politically expedient effort only underscored the constitutional infirmity of the sectarian Pledge and did nothing to shore it. Even if this attempted

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[70] *See* Act of Nov. 13 2002, Pub. L. 107-293 § 2, 116 Stat. 2057, 2060.

historical revision of the intent underlying the 1954 addition of "under God" to the Pledge were successful, the sectarian Pledge still fails constitutional muster. A plain reading of the "new" sectarian Pledge reveals the untouched cracks beneath its shiny new paint.

"I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."[71] Notably, the words "under God" remain in the Pledge. "Under" in this context means "in or into a position below or beneath something,"[72] whereas "God" here means "the Being perfect in power, wisdom, and goodness who is worshiped as creator and ruler of the universe."[73] The message sent by this "new" sectarian Pledge is precisely the same as the old: our government is subservient to a deity. The Pledge continues to cast its eye of disfavor on those who view god as figment of man's imagination. For all the reasons described previously above, this second codification of the sectarian Pledge remains unconstitutional.

III.
CALIFORNIA EDUCATION CODE SECTION 52720 IS UNCONSTITUTIONAL

Regardless of the State of California's intent in enacting Education Code section 52720, it is impossible to divorce the intent and effect of the sectarian Pledge from the action of the State Government in promoting its daily recital. Further, as this Court has repeatedly acknowledged, the

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[71] *Id.*
[72] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1287 (10th ed. 1997).
[73] *Id.* at 500.

school setting in which this statute has its effect merits heightened concern.[74]

Religious views are inherently personal in nature. Although some see fit to share them freely, others are more comfortable keeping such views to themselves. Jefferson was against sharing his religious views with the public, "because it would countenance the presumption of those who have endeavored to draw them before that tribunal, and to seduce public opinion to erect itself into that inquisition over the rights of conscience which the laws have so justly proscribed.[75] This perspective resounds in the heart of the Atheist, whose minority view usually meets with disdain or outrage.[76]

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[74] For example: "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, 'the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .'" Edwards v. Aguillard, 482 U.S. 578, 583-584 (1987) (citations omitted.)

[75] Letter from Thomas Jefferson to Benjamin Rush (April 21, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 379, 380–81 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

[76] Consider this recent attempt by a non-theist to give an invocation at the opening of a city council meeting. In a measure calculated to show their contempt for his views, a significant number of the council members staged a walkout. In the words of Councilman George, "He can worship a chicken if he wants to, but I'm not going to be around when he does it." Herb Silverman, *The Story Behind Atheist's Invocation and Aftermath of*

Children, embroiled in the process of socialization, are particularly sensitive to peer pressure.[77] To offer a child the alternative of acknowledging her country's subservience to a deity of which she doubts or rejects, or sitting in silent protest, is to offer no choice at all. Children have the unfortunate ability and tendency to be cruel and insensitive. If Jefferson, drafter of the Declaration of Independence and a man of indubitable moral courage, was loathe to share his personal religious views, it is unconscionable that we should require it of a child. By forcing a child to sit in silent protest while the majority comfortably stands and recites the sectarian Pledge is to put the child's religious views before the harsh court of juvenile public opinion. That child is marked as a non-believer and set up for proselytization and harassment. The child will likely be stigmatized and subjected to the cruelest verbal and physical assaults.[78] Further, given that allegiance to one's country is also implicated by the Pledge, "[a] student who refuses to recite the Pledge will be tainted as both unreligious and unpatriotic [as well.]"[79] To knowingly condone such a choice is unbefitting a Nation that purports to guarantee freedom for the "rights of conscience" of all.

Walkout, CHARLESTON NET, April 14, 2003, *available at* http://charleston.net/stories/041403/com_14silverman.shtml.

[77] "We stressed in Lee the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.'" Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311-312 (2000).

[78] This is precisely what happens. The attacks range from merely annoying (bible verses and other religious artifacts mysteriously appearing in books, on desks, etc.) to violent (beatings and other physical attacks). Affidavits describing specific instances of abuse in detail can be furnished upon request.

[79] Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia,* 81 N.C. L. REV. 1865, 1895 (2003).

CONCLUSION

This Court offers the last bastion of protection for the sometimes unpopular application of constitutionally guaranteed freedoms. You will undoubtedly face a maelstrom of outrage in remaining faithful in this case to the constitutional ideal of freedom of conscience for all. This should not deter protection of this precious freedom. This Court should speak with one voice and hew down the daring and dangerous efforts of those who have sought to seduce the public opinion to substitute itself into that tyranny over the rights of conscience that the laws have so justly abdicated.[80] This Court should affirm the opinion of the Ninth Circuit Court of Appeals.

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[80] Paraphrasing Jefferson. *See* Letter from Thomas Jefferson to Edward Dowse, (April 19, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 376, 378 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).